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October Term 1973

Nos. 73-1377 and 73-1378

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, ET AL.,

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

v.

CAMPAIGN CLEAN WATER, INC.,

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia and the Fourth Circuits

BRIEF OF THE CENTER FOR GOVERNMENTAL RESPONSIBILITY AS AMICUS CURIAE IN SUPPORT OF THE CITY OF NEW YORK

Fletcher N. Baldwin, Jr.
Jon L. Mills

Attorneys, Center for Governmental Responsibility
Holland Law Center
Gainesville, Florida 32611

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Center for Governmental Responsibility files this brief as amicus curiae under rule 42 (2) with the consent of both Respondents and Petitioner.

The Center is a privately funded non-partisan, non-profit organization housed at the University of Florida College of Law committed to the goal of promoting the accountability of government officials and institutions to the public. Its interest in this case emanates from its detailed study of the impoundment controversy and its effort to implement its scholarly conclusions. The year and one-half study was conducted by the Center's predecessor, the McIntosh Foundation Executive Impoundment Project,* whose summary findings have been reproduced at 119 CONG. REC. S21120 (daily ed. Nov. 27, 1973). The Center has continued the study of the impoundment issue to date. The study has produced, among other things, two law review articles: Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191 (1974); Levinson & Mills, *Budget Reform and Impoundment Control*, 27 VAND. L. REV. 618 (1974). Further, the Center has acted as amicus curiae on the issue in the instant case in three courts: *Minnesota v. Train*, No. 73-1446 (8th Cir., argued Feb. 13, 1974); *Texas v. Train*, No. 73-3965 (5th Cir., argued Apr. 29, 1974); and *Florida v. Train*, No. 73-156 (N.D. Fla. Feb. 25, 1974), *appeal argued*, Civil No. 73-3965, 5th Cir., Apr. 29, 1974. The Center's special interest is in the legal development and resolution of federal impoundment issues.

*This project is further described in *Joint Hearings on S.373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 22 (1973).

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Petitioner

v.

THE CITY OF NEW YORK
ON BEHALF OF ITSELF AND
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SITUATED MUNICIPALITIES WITHIN
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CAMPAIGN CLEAN WATER, INC.,

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia and the Fourth Circuits

**BRIEF OF THE CENTER
FOR GOVERNMENTAL RESPONSIBILITY
AS AMICUS CURIAE
IN SUPPORT OF
THE CITY OF NEW YORK**

STATEMENT OF THE FACTS

In 1972, Congress passed the most extensive program for cleaning the nation's waters in history. The Federal Water Pollution Control Act Amendments of 1972 [hereinafter cited as the "Water Pollution Control Act" or the "Act"] established as a national goal the achievement of clean waters in America by 1985. Congressional hearings on the proposed legislation were extensive. The bill passed the Senate by a vote of 74 to 0 and the House by 336 to 11.

On October 17, 1972, the President vetoed the bill because of what he termed "inflationary considerations." Congress considered the veto message and overwhelmingly overrode the veto. In the House, the vote was 247 to 23; in the Senate, 52 to 12.

Subsequently, on November 22, 1972, President Nixon ordered the Administrator of the Environmental Protection Agency not to allot the full amount provided in the final bill. Nixon ordered allotment of two billion dollars in fiscal year 1973 and three billion dollars in fiscal 1974. The amounts established in the bill were five billion dollars for fiscal 1973 and six billion dollars for fiscal 1974. The result was a cutback of fifty-five percent of the funding provided by Congress.

SUMMARY OF ARGUMENT

The principal question posited by the instant case is whether the Administrator of the Environmental Protection Agency has discretion to refuse to allot the full amounts authorized by the Water Pollution Control Act. The statutory history and the overall structure of the statute demonstrate that the allotment provision is mandatory. There is no statement in legislative history stating that allotment is discretionary, while one of the principal sponsors of the bill directly stated that allotment is mandatory. Spending discretion exists, but at the obligation phase rather than at allotment. Additionally, the overall scheme of the statute demonstrates the desire of Congress to provide long range planning certainty to achieve total restoration of the nation's waters by 1985. This purpose is best accomplished through a mandatory allotment schedule coupled with some discretion in the obligation phase. There is a substantial negative impact on long range state planning when there is an exercise of discretion at allotment as distinguished from exercise of discretion at obligation. While the statute will operate well with mandatory allotment, insertion of discretionary allotment would cause illogical results. Refusal to allot in full will cause permanet loss of funds for obligation.

At whatever stage of the funding process, refusal to allot or expend fifty-five percent of the Water Pollution Control Act funds would be an abuse of discretion. Congress intended to provide funding for the solution of water pollution problems which would be available to the states. Fifty-five percent impoundment, substantially curtailing implementation of the program, is beyond the discretion of the Administrator. Further, justifications given as the basis for the refusal to allot were improper reasons outside the realm of relevant considerations; therefore, any exercise of discretion on this basis is improper.

Actions by the Administrator were not only outside his statutory authority but also beyond his constitutional authority. Neither the "faithfully execute" clause nor "inherent authority" support executive action in refusing to allot. Cases considering constitutional authority of the executive branch have consistently held it to be limited when impinging upon the intent of Congress, especially in the domestic area. Further, the refusal to allot after a veto of the Act had been overriden operated as an unconstitutional absolute veto.

Sovereign immunity is no bar to the suit against the Administrator; first, because of the well established exception of "officer suit" and, second, because the Administrative Procedure Act waives sovereign immunity. Similarly, political question is no bar to justiciability in the instant case since clear standards exist for judicial review and there is no absolute commitment to a coordinate branch of the absolute power to spend or not to spend.

In sum, there is no bar to judicial review of the action of the Administrator in refusing to allot. Further, these actions were in contravention of the explicit provisions and purposes of the Act and the Constitution.

ARGUMENT

I. THE PLAIN MEANING AND LEGISLATIVE HISTORY OF THE ALLOTMENT PROVISIONS OF THE WATER POLLUTION CONTROL ACT, TOGETHER WITH THE OVERALL STRUCTURE OF THE ACT, DEMONSTRATE THAT THE ADMINISTRATOR HAS NO DISCRETION TO REFUSE TO ALLOT.

The issue in the instant case is the meaning of the allotment phase of the Water Pollution Control Act -- not the academic issue of the mandatory or permissive nature of appropriations generally.[1] The precise question before the Court is whether the allotment provision is mandatory and requires the Administrator to allot the full sums authorized by Congress. To determine whether an action within the funding process is mandatory, it is imperative to analyze not only that particular provision, but all relevant

[1] For discussion of the general issue, *see* Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 214 (1974). No generalization can be made about the mandatory nature of various phases of the spending process. There must however be reference to the particular budgetary provision with the other relevant provisions of the appropriations act. In fact, President Nixon, in vetoing an HEW-OEO appropriation, recognized the possible effect of statutory language:

> [N]early nine tenths of these increases are for mandatory programs which leave the executive branch no discretion whatever as to the level or the purpose of the added expenditures.

PUBLIC PAPERS OF THE PRESIDENT, *State of the Union Address*, Jan. 27, 1970, at 22.

portions of the funding process of that statute.[2] When the allotment phase is read as mandatory, the expenditure scheme of the Act is logical and internally consistent. Further, mandatory allotment best implements the goals of the Act. In contrast,if the allotment provision is read as discretionary, the funding procedure becomes speculative and the Act is effectively crippled.

This is not to say the Administrator has no discretion in the implementation of the Act. In fact, discretion is apparently accorded at the obligation phase. However, the plain meaning and the history of the relevant provisions show that the allotment phase is mandatory.

A. THE HISTORY AND PLAIN MEANING OF THE AUTHORIZATION AND ALLOTMENT PROVISIONS (SECTION 205 AND SECTION 207) SHOW THAT ALLOTMENT IS MANDATORY.

The sums authorized to be appropriated must be fully allotted as specified by Congress in sections 205 and 207:

> §205--Sums authorized to be appropriated pursuant to section 207...shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized....
>
> §207--There is authorized to be appropriated to carry out this title...for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

[2] In the instant case, it should be noted that the Act reverses the normal budgetary procedure whereby sums are appropriated by Congress and later obligated and expended by an executive agency (see Appendix). In the Act, funds are first authorized under section 205 to be appropriated later to carry out the purposes of the Act. The Administrator is then required under section 205 to *allot* the authorized contract authority among the states. Once allotted, the sums become available to the states for *obligation*. The Administrator then reviews grant applications submitted by states and municipalities to determine if they satisfy statutory and regulatory criteria. If approved, a contractual obligation arises and, upon project completion, an appropriation liquidates the obligation.

I. THE PLAIN MEANING OF THE ALLOTMENT PROVISION REQUIRES ALLOTMENT OF THE FULL SUMS LISTED IN SECTION 207.

Initially, it should be recognized that "shall allot" is an intrinsically mandatory phrase. *See Boyden v. Comm'r of Patents*, 441 F.2d 1041, 1043 & n.3 (D.C. Cir.), *cert. denied*, 404 U.S. 842 (1971); *Stanfield v. Swenson*, 381 F.2d 755, 757 (8th Cir. 1967). It is therefore mandatory that, under section 205 (a), the Administrator allot sums authorized to be appropriated in section 207. The sums authorized to be appropriated in section 207 are five and six billion dollars. No other sums are mentioned. The plain meaning of the language, therefore, is that the Administrator must allot the amount authorized to be appropriated.

Since sections 205 and 207 are plainly expressive of a mandatory allotment, resort to legislative history is unnecessary. Interpretation of the funding provisions of the Act should remain within its four corners, giving due weight to the plain meaning, internal logic and goals of the Act's provisions. Use of extrinsic evidence must be predicated upon a finding that a statute is ambiguous or that its plain meaning leads to absurd or futile results. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892). The fact that the Administrator *claims* that there is an ambiguity is not conclusive. The Administrator offers legislative history in support of its assertion that the construction of the statute is doubtful. Extrinsic evidence, however, must be used "to *solve*, but not to *create* an ambiguity."

United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932); *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899). When considered by itself, the Act is clear in declaring that the Administrator *shall allot* the amounts specified.

It must also be recognized that the "not to exceed" language in section 207 does not modify the clear meaning of "shall allot" as has been argued by the Administrator. *See* Brief for Petitioner at 15. The Administrator argues that "not to exceed" shows that the sums mentioned are only ceilings which reflect an intent to allow obligation of lesser amounts. However, section 205 is designed to mandate allotment and to specify the date for allotment while section 207, where the phrase "not to exceed" appears, is designed to specify the year of availability and the maximum sums authorized to be appropriated. Perhaps there might be warrant for imposing "not to exceed" on section 205 if there were no other explanation for its existence in the Act, *cf. Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819), but there is another explanation.

The phrase operates as a limit on appropriations (a limit on the Congress)[3] and a ceiling on the authority of the Administrator to obligate funds. The phrase means "no more than." Further, "not to exceed" paces expenditure. Section 207 utilizes "not to exceed" three different times as a ceiling on amounts which may be spent in each year so as to pace expenditure of the total of 18 billion dollars. If in fact Congress were actually attempting to utilize "not to exceed" to be expressive of discretionary allotment it could

[3] In a discussion of an act with an "authorization to appropriation" mechanism similar to that in the instant case, a district court stated that authorization provisions appeared to be a limitation on Congress, rather than on the Administrator, to prevent appropriation of more funds than those authorized for a given program. Guadamuz v. Ash, 368 F. Supp. 1233, 1239-40 (D.D.C. 1973).

have done so explicitly. The clause could have read "authorized to be allotted and appropriated not to exceed . . . ."[4]

When considered in and of itself, the Act is clear in declaring that the Administrator shall allot the amounts specified. There is no need to resort to legislative history although that history also supports the mandatory nature of allotment.

2. THE LEGISLATIVE HISTORY OF SECTIONS 205 AND 207 SUPPORTS THE CONCLUSION THAT WHILE THERE IS DISCRETION WITHIN THE ACT TO CONTROL OBLIGATIONS, THERE IS NO DISCRETION AT THE ALLOTMENT PHASE.

The focus of the statutory controversy in the instant case is the interpretation of the inclusion or omission of three words and phrases within sections 205 and 207 during the enactment of the Water Pollution Control Act:

(1) deletion of "all" in section 205 (a) by the conference committee:

> [All] sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator . . . .

(2) addition of "not to exceed" before the sums specified in section 207:

> There is authorized to be appropriated to carry out this title, other than §§208 and 209, for the fiscal year ending June 30, 1973, [not to exceed] $5,000,000,000,

[4] "The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." Iselin v. United States, 270 U.S. 245, 250-51 (1925).

for the fiscal year ending June 30, 1973, [not to exceed] $6,000,000,000 .....

(3) the words "shall be allotted" in section 205.

The deletion of "all" in conference is asserted to be an indication that Congress intended to allow discretion in the allotment phase. However, nowhere in the conference report or any legislative history is there a direct statement to that effect. The Administrator relies strongly on a statement by Representative Harsha:

> I want to point out that the elimination of the word "all" before the word "sums" in section 205 (a) and insertion of the phrase "not to exceed" in section 207 was intended...to emphasize the President's flexibility to control the *rate of spending*.

118 CONG. REC. H9122 (daily ed. Oct. 4, 1972) (emphasis added). The key to understanding the statement, however, comes when Representative Harsha further explicates:

> Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. *This is the pacing item* in the expenditures [*sic*] of funds.

Id. (emphasis added).

The screening procedure and project approval which Representative Harsha has identified as the pacing item to control the rate of expenditures is the obligation phase. Representative Harsha clearly specifies that it is *this* phase (obligation) of the funding process where he finds the discretion to control the *rate* of spending. Moreover, Congressman Harsha continues: "It is clearly the understanding of the managers that under these circumstances [the application

review procedure] the Executive can control the *rate of expenditures*." *Id.* (emphasis added). The comments of Representative Harsha make clear that the statement primarily cited as making allotment discretionary actually refers to "obligation." Nowhere in these comments is there reference to "flexibility" in allotment or to allotment as a "pacing item." Further, because of the different phases in the Act, control over allotment does not so much affect the *rate* of spending as it does the *amount* of spending,[5] further indicating that the reference to discretion relates to obligation.

A colloquy between former Representative Ford and Representative Harsha further supports the interpretation that discretion was granted only at the obligation phase:

> As I understand the comments of [Representative Harsha], the inclusion of the words in section 207 in three instances of "not to exceed" indicates that it is a limitation. More importantly that it is not a mandatory requirement that in 1 year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*

Id. at H9123 (emphasis added). Representative Harsha responded:

> I do not see how reasonable minds could come to any other conclusion than that the language means *we can obligate or expend up to that sum -- anything up to that sum but not to exceed that amount.*

Id. (emphasis added).

[5] Allotment relates only to the amount a state may obligate. Obligation may occur at various times during the year after administrative review of applications, thereby pacing the rate of expenditure. *See* p.28-29,32 *infra*.

It is clear that, if what Representative Harsha says is accurate, namely that anything up to the maximum sum can be obligated or expended, then discretion at the allotment phase is virtually impossible. That is, if the Administrator exercises *any* discretionary reduction at the allotment phase, then what Representative Harsha proclaims as possible becomes impossible.[6]

The legislative history is totally devoid of any statement that discretion exists at the allotment phase to withhold funds. In fact, as explained above, the statements advanced by the Administrator as indicating a discretionary allotment do not even refer to the allotment phase. Instead, the legislative history is replete with direct statements referring to discretion at the obligation phase. This pattern of legislative history, tending to place discretion at obligation rather than allotment, is further strengthened by a categorical statement in the legislative history by a principal sponsor of the bill which directly applied to sections 205 and 207 and explains their effect:

> Under the amendments proposed by Congressman William Harsha and others, the authorizations for *obligational authority* are "*not to exceed*" $18 billion over the next 3 years. Also, "all" sums authorized to be obligated need not be committed, though *they must be allocated*.[7] These two provisions were submitted to give the administration some flexibility concerning the *obligation* of construction grant funds.

[6] Allotment necessarily precedes obligation. If allotment is discretionary, then the Administrator *cannot* possibly obligate up to the maximum sum, unless he exercises his discretion to allot the full amount. If allotment is mandatory, then Congressman Harsha's statement is correct and the Administrator can obligate up to the full amount. There is ample history supportive of making full amounts available for obligation. *See* footnote 15, and accompanying text *infra*.

[7] The Senate bill had used the term "allocate" rather than allotment. H.R. REP. NO. 1465, 92d Cong., 2d Sess. 113 (1972). *See* New York v. Train, 494 F.2d 1033, 1043 n.19 (D.C. Cir. 1974).

118 CONG. REC. S18546 (daily ed. Oct. 17, 1972) (remarks of Senator Muskie) (emphasis added). This statement by Senator Muskie, Senate sponsor of the Act, in no way conflicts with the statements of Representatives Harsha and Ford. The statement does, however, provide a critical clarification. Rather that merely alluding to where discretion is vested, Senator Muskie clearly states when discretion is *not* vested.

The deletion of the word "all" from section 205 has been given undue weight. The provision has essentially the same meaning with or without "all." Moreover, this Court has stated that statutes must be interpreted on "the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952). The act of deleting the word "all" should be accorded no particular significance if the meaning of the provision is not affected by the omission. "All sums" is equal to "sums" albeit less emphatic.[8]

[8] It is a general principle of English grammar that when there is the absence of a qualifying adjective, the noun is considered a totality. *See* P. ROBERTS, MODERN GRAMMAR 29 (1968). An illustration of the significance that Congress apparently gives to the term "all" is found in the legislative history of the old Senate Bill. Section 205 of that bill read, "*all allocations* to the states under Section 205 are to be made on the basis of population" (emphasis added). The commentary by the committee explaining this section reads as follows: "This section provides that *sums appropriated* or authorized to be obligated for the construction of treatment works under Title II, will be allocated among the states on the basis of population alone" (emphasis added). Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 1448 (1973). The significance of this passage is the absence of "all" before "sums" in the commentary, indicating a tendency in Congress not to use an adjective in this context, and probably for no particular reason -- whether that adjective be "some," "all" or "the."

billion figure and correctly found it to be a clear expression of Congressional will.

> We find that it was Congress' intention that that full $18 billion be spent to control water pollution.

494 F.2d at 1042.

This conclusion should also be reached by this Court. If the full amount is not allotted, as the law requires, the needs and goals of this Nation to clean up its waters will not be met. Subsequent estimates now unfortunately demonstrate that the Congressional estimate itself was short.[5] Congress certainly did not intend that the development of a shortgage would justify a reduction in allotment.

D. The Allotment Scheme Was Established to Aid the States in Planning to Meet Statutory Requirements.

In the developmental stages of the Act amendments were proposed in both houses of Congress to strike the contractual obligation authority which binds the United States to pay its proportional share upon approval of a project by the Administrator. The traditional method of funding has been the opposite: to reimburse the grantee through the annual appropriations process. The experience of Congress with the old method was that it did not work as intended and that the requirements of the Act necessitated a firm commitment that could be relied on by potential grantees for long range planning purposes. Congressman Jim Wright, a member of the House Public Works Committee and later a conferee, in debating the issue on the floor of the House, made the following points which emerged as the prevailing view in the House:

[5] The Administrator's report to Congress indicates total national needs of $61.5 billion, of which $60.1 is eligible for federal grant participation. "Report to Congress—Costs of Construction of Publicly-Owned Wastewater Treatment Works—1973 'Needs' Survey."

> The bill requires that by 1976 every publicly owned plant in the Nation must provide at least secondary treatment, and that by 1981 it must employ as a minimum "the best practicable technology."[6]
>
> The bill promises that the Federal Government will contribute its pro rata share of the cost.
>
> But what good is that requirement, and what good is that promise, if we do not absolutely intend to deliver upon our part of the bargain?
>
> Why should advance obligational authority be necessary? The events of the last few years suggest the answer.
>
> The authorization for fiscal 1969 was $700 million, but the appropriation was only $214 million—less than one-third—and the amount actually spent was only $134 million.
>
> For the 4 years, 1968 through 1971, the shortfall of appropriations below the amounts held out in the authorization bill totaled approximately $1.2 billion. And because of periodic administrative freezes on construction grants, the shortfall in the amounts actually granted came to approximately $1.6 billion.
>
> . . . .
>
> Mr. Chairman, many municipalities, faced with truly critical water pollution problems and intent on solving those problems in a timely fashion notwithstanding the failure of the Federal Government to live up to its part of the bargain, went ahead on their own and built the plants.
>
> Obviously it would not be our intention to penalize those communities for having demonstrated the

[6] The dates were changed in the final version of the Act to 1977 and 1983 respectively.

initiative and determination to move ahead. And so this bill authorized more than $2 billion to reimburse them for that portion of the authorized Federal share that was withheld from them.

But other communities waited, because they were unsure of the strength of the congressional commitment. And because they waited, the cost both to them and to the Federal Government is considerably greater today than it would have been had they been encouraged to proceed 4 years ago.

So this is the acid test. *We decide right now just how serious we are about cleaning up the streams of this country.* Do we mean it, or do we not? Are we certain, or are we uncertain?

I for one am certain. I believe that most of the Members are. I am ready to make that commitment. I think the Public Works Committee is certain, and the majority of the House is certain. *We can prove it by voting down this amendment and saying to the communities of this Nation that once they put their hands to the plow, they need not turn back.*

(Emphasis added.) 118 Cong. Rec. H. 2726 (Daily ed. Mar. 29, 1972).

Congressman Harsha emphasized the need for advance planning and assured availability of funds.

> Because of the magnitude of this program, it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants, including the sale of bonds that they have to sometimes negotiate.

> Now, *this can only be accomplished if there is assured availability of Federal grant funds for future years.* This necessary assurance is not provided by merely advancing appropriations for 1 year. That will not meet the needed assurance of long-term planning. This is a continuing program.
>
> The construction of a waste treatment plant consists of planning; economic and engineering feasibility studies; preliminary engineering for the preparation of plans, specifications, and estimates; the acquisition of land where appropriate, and the actual physical construction of the building itself. Under this legislation each one of these steps is ordinarily a separate project, a separate contract, and it is funded as completed or as work progresses. This is not the case under existing law where 25 percent of the total project must be completed before any payment can be made.
>
> At the time any one of these preliminary steps is taken, such as the plans, specifications, and estimates, there is no assurance that appropriated funds would be available for subsequent projects for land acquisition and the actual building of this plant for which the plans, specifications, and estimates are being prepared. This, therefore, makes the orderly continuous planning and scheduling of work impossible.

(Emphasis added.) 118 Cong. Rec. H. 2727, H. 2728 (Daily ed. March 29, 1972).

Senator Muskie presented similar prevailing arguments in the Senate.

Mr. President, in this bill we have undertaken to do something that we have never done before on a problem with such long-range impact as this. We have set deadlines that must be met by industry, and presumably by all polluters, including governmental polluters. We have set a deadline in 1976 and we have set a deadline in 1981; and finally we set the goal of no discharges of pollutants into any waterways by 1985.[7]

There is only one way to meet deadlines like that, and that is to make a total commitment now. If we indicate in any way any reservations about our commitment as a government and as a Congress to the achievement of those goals in the point of view of the public sector, what we have done is undermine the credibility of our determination to insist on that goal and its achievement by the private sector.

To achieve the deadlines we are talking about in this bill—I think all of us in the committee are proud of it, and we are committed to it—*we are going to need the strongest kind of evidence of the Federal Government's commitment to pick up its share of the load.* We cannot budge, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill. The municipalities, through the Conference of Mayors, have estimated at the request of the committee that the initial investment required is $30 to $35 billion. The authorization we have provided in this bill of $14 billion[8] for 4 years

[7] The dates were changed in the final version of the Act to 1977, 1983, and 1985 respectively.

[8] This was changed to $18 billion in the final version of the Act.

> to meet the Federal share is a hard, conservative figure. All we are saying in asking the Senate to approve contract authority is a commitment now to that $14 billion. If we have any hesitation about that commitment, then we will eliminate the contract authority and keep our options open.

(Emphasis added.) 117 Cong. Rec. S. 17445 (Daily ed. Nov. 2, 1971).

As noted by the District Court in *City of New York v. Ruckelshaus, supra,* 674 F. Supp. at 674:

> The seriousness of the planning problem was understood by Congress. It was one of the reasons for utilizing the device of allotment, thereby making funds available for obligation [by contract authority], in lieu of the ordinary appropriations procedure.

It strains credulity to assume that Congress established the allotment and contract authority funding mechanism to correct the vagaries of the annual appropriation process, and coincidently granted the Administrator discretion to undercut its commitment by reintroducing the uncertainties of the old system back into the process. The firm commitment of Congress vanishes with any exercise of discretion by the Administrator *at the allotment stage.* If the funding provisions are to have any meaning at all, it can only be concluded that Congress did not intend the sums authorized for allotment to be altered at the whim of the Administrator.

II. THE ADMINISTRATOR HAS NO DISCRETION TO REDUCE ALLOTMENTS.

A. The Act Requires Full Allotment.

The Administrator contends that he has discretionary authority to allot less than the full amounts authorized to be appropriated. The basis for this contention rests entirely on amendments that were agreed to by the House and Senate Conferees considering the bill. The phrase "not to exceed" was placed before the sums specified in Section 207 and the word "all" was deleted before the phrase "[s]ums authorized to be appropriated" in Section 205.[9] The Administrator's position is untenable.

The overriding intent of Congress was to commit the Federal government to a program assuring financial means to accomplish the tasks envisioned in the Act. The pertinent language of the Act and its legislative history, as outlined in Part

[9] The two amendments in question were to Sections 205 and 207 of the Act, as shown below (bracketed material deleted, italicized material added):

ALLOTMENT

Section 205. (a) [All] sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediate preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments. . . .

AUTHORIZATION

Sec. 207. There is authorized to be appropriated to carry out this title . . . for the fiscal year ending June 30, 1973, *not to exceed* $5,000,000,000, for the fiscal year ending June 30, 1974, *not to exceed* $6,000,000,000 and for fiscal year ending June 30, 1975, *not to exceed* $7,000,000,000.

The "not to exceed" language was an amendment only to the House version of S.2770; the words already appeared in the comparable section of the Senate bill.

I of this *amicus* brief, clearly indicate that the Administrator must allot the *full* sums authorized to be appropriated by Section 207. Indeed, it is only by full allotment that there could *even be control over the* rate of spending at subsequent stages.

The Amendments relied on by the Administrator were sponsored by Congressman William H. Harsha of Ohio.[10] At the time the Act was being considered, Congressman Harsha was the ranking minority member of the House Public Works Committee, which reported on the House version of the Act. He was also the floor manager of the bill and a member of the conference committee. Congressman Harsha explained to the House the meaning of his amendments.

> . . . I want to point out that the elimination of the word "all" before the word "sums" in Section 205 (a) and insertion of the phrase "not to exceed" in Section 207 was intended by the managers of the bill to *emphasize* the President's flexibility *to control the rate of spending.*

(Emphasis added.) 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972).

Significantly, Congressman Harsha was merely emphasizing what the Act already provided: namely, full allotment and deferred spending. At a later point of the debate, a colloquy between Congressmen Jones, Ford and Harsha revealed the intent of the amendments.

> **Mr. Gerald R. Ford.** Mr. Speaker. I think it is vitally important that the intent and purpose of Section 207 is spelled out in the legislative history here in the discussion of this conference report.

[10] The District Court in *The City of New York v. Train, supra,* noted that the views of sponsors of the legislation at issue are of particular importance when reviewing its legislative history. 358 F.Supp. at 677.

As I understand the comments of the gentleman from Ohio [Harsha], the inclusion of the words in Section 207 in three instances of "not to exceed" indicates that is a limitation. More importantly, that it is not a mandatory requirement that in one year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*

Mr. Harsha. I do not see how reasonable minds could come to any other conclusion that *the language means we can obligate or expend up to that sum*—anything up to that sum but not to exceed that amount . . . .

Mr. Gerald R. Ford. Mr. Speaker. I would like to ask the distinguished chairman of the subcommittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio [Harsha].

Mr. Jones of Alabama. My answer is "yes." Not only do I agree with him, but the gentleman from Ohio offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio [Harsha].

Mr. Gerald R. Ford. Mr. Speaker. This clarifies and certainly ought to wipe away any doubts anyone has. The language is not a mandatory requirement for *full obligation and expenditure* up to the authorization figure in each of the three fiscal years. . . .

(Emphasis added.) 118 Cong. Rec. H. 9123 (Daily ed. Oct. 4, 1972).

This history necessarily reflects the understanding of the Congress that there *must be* full allotment, for only by such full allotment could it be possible for subsequent expenditures to be made *up to* the authorization figure. From the above exchange it is clear that any discretion of the Administrator regarding the authorized funds was intended to be exercised only through the mechanism of *obligation and expenditure at later stages, and not through the allotment process.*

Congressman Harsha further noted that even in the exercise of discretion by the Administrator at a later point in time such discretion related *solely* to approval of plans, specifications and estimates.

> . . . I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications and estimates. *This is the pacing item in the expenditures of funds. It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures.*

(Emphasis added.) 118 Cong. Rec. H. 9122 (Daily ed. Oct. 4, 1972).[11]

Congressman Harsha explained the impact of the Act's funding provisions in terms of expenditures in future fiscal

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[11] Congressman Harsha reiterated his comments on the floor of the House after the President's veto. 118 Cong. Rec. H.10268 (Daily ed. Oct. 18, 1972). Congressman Harsha cited as support for the existence of flexibility the fact that impoundments by the executive branch of highway funds. 118 Cong. Rec. H.9122 (Daily ed. Oct. 4, 1972). The District Court in *The City of New York v. Ruckelshaus, supra,* 678 F.Supp. at 678, pointed out:

> . . . The impoundments of Federal-Aid Highway Act moneys referred to by Congressman Harsha were of funds allotted, i.e., *the controls were being exercised at the obligation level rather than at the allotment level.*

(Emphasis added.) Significantly, the very highway impoundments referred to by Congressman Harsha were declared to be illegal by the Court in *State Highway Commission of Missouri v. Volpe,* 479 F.2d 1099 (8th Cir., 1973).

years. In so doing, he demonstrated that it was his understanding that Sections 205 and 207 required *allotment of the full amount* of the sums specified in Section 207.

> [T]he first major impact of obligations from the $5 billion authorizations for the fiscal year ending June 30, 1973, is in fiscal year 1975 . . . .
>
> As a matter of fact, for fiscal year 1973 if *all the money were obligated and placed under contract, there would only be $20 million needed to meet the obligations.*

(Emphasis added.) 118 Cong. Rec. H. 10268 (Daily ed. Oct. 18, 1972).

Unquestionably, when Congressman Harsha spoke hypothetically of the *obligation* of the entire $5 billion, he necessarily expressed his recognition that the entire $5 billion had to be available by allotment for obligation. His statement was intended to *emphasize* to the House that the President's fear about "budget-wrecking" was unwarranted in view of the fact that there would be an inherent lag between the time when funds were *obligated* and the time when they would actually be *spent*.

Thus, the pacing of expenditures is built into the funding mechanism, but such pacing is itself dependent upon full allotment as an absolute prerequisite. Senator Muskie made the same point to the Senate when he noted that the full $18 billion authorized by the Act probably would not be spent until the end of fiscal year 1979.[12] Senator Muskie at the time was

[12] Senator Muskie introduced into the record a table indicating the impact of the $18 billion on the budget. It was estimated that due to the extended period of time needed for construction that actual expenditure under full obligation would be the following percentages of the sums authorized to be appropriated: for the first year, 5 percent; the second year, 20 percent; the third year, 30 percent; the fourth year, 40 percent; and for the fifth year, 5 percent. 118 Cong. Rec. S. 18547 (Daily ed. Oct. 17, 1972).

Chairman of the Senate Subcommittee on Air and Water Pollution, which reported out the Senate version of the Act. He was a floor manager of the bill and a member of the conference committee. Senator Muskie, in a specific reference to the amendments proposed by Congressman Harsha, made it clear to the Senate that the meaning of the Act is as contended by the State of Minnesota and the City of New York herein.

> Under the amendments proposed by Congressman William Harsha and others, the *authorizations for obligational authority* are "not to exceed" $18 billion over the next 3 years. Also "all" sums authorized to be obligated *need not be committed, though they must be allocated.* These two provisions were suggested to give the administration some *flexibility concerning the obligation of construction grant funds.*

(Emphasis added.) 118 Cong. Rec. S. 16871 (Daily ed. Oct. 4, 1972.[13]

Incredibly, the Administrator points to the legislative history and incredulously contends that Congressman Harsha, Senator Muskie and others, when explaining their understanding of the amendments, and in their use of such descriptive terms as "the obligation of construction grant funds," "the expenditure of funds," "controlling the rate of spending," and the "pacing item in the expenditure of funds," did not thereby intend to distinguish between the allotment stage, and the obligation and expenditure stages, of the statutory scheme. The Administrator's contention is based upon a palpable misconstruction of the Act's allotment provisions and constitutes a misrepresentation of the legislative history.

[13] Senator Muskie reiterated his comments on the floor of the Senate after the President's veto. 118 Cong. Rec. S.18546, S.18549 (Daily ed. Oct. 17, 1972).

B. If the Administrator Has Any Discretion at the Allotment Stage, He Has Abused It.

1. Discretion was not exercised within the bounds delineated by the Act.

The Administrator's discretion involves solely approval or disapproval of projects based upon criteria set forth in the Act. The Administrator has abused this limited discretion by his refusal to allot over one half (55 percent) of funds authorized by Congress to construct publicly owned treatment works. The objectives of the Act, its goals, policies, effluent limitation deadlines, and enforcement provisions have been ignored by the Administrator. He has made no effort to justify his action other than by reference to the President's evaluation of competing national priorities, regardless of the declared intent of Congress as stated by law.

The Administrator may not arrogate such legislative power to himself. Congress alone enacts the law. Congress established bounds within which the Administrator is *required* to work in exercising any limited discretion he may have. These bounds are delineated by the clear language of the Act. The Administrator may not look beyond these bounds for supporting rationale to reduce the allotment of funds. If his decision had been based on the needs and problems of sewage treatment facilities construction, it might have been on more solid ground. However, a decision based on totally unrelated considerations is contrary to law. This principle was firmly established in a case analogous to those before the Court, i.e., *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1114 (8th Cir., 1973). The issue before the court in *Volpe* was whether the Secretary of Transportation may defer authority to obligate highway funds previously apportioned to the State or

Missouri under the Federal-Aid Highway Act of 1956 when the reasons given for deferment by the Secretary were the status of the economy and the need to control inflationary pressures. The funding scheme in the Highway Act is that principally adopted by Congress in the Act under consideration. The rationale of the *Volpe* case is irrefutable and should be recognized by this Court.

> To reason that there is implicit authority within the Act to defer approval [of projects] for reasons totally collateral and remote to the Act itself requires a strained construction which we refuse to make. It is impossible to find from these specific grants of authority discretion in the Secretary to withhold approval on projects Congress has specifically directed *because of a system of priorities the Executive chooses to impose on all expenditures.* The Congressional intent is that the Secretary may exercise his discretion to insure that the roads are well constructed and safely built at the lowest possible cost, all in furtherance of the Act, but *when the impoundment of funds impedes the orderly progress of the federal highway program, this can hardly be said to be favorable to such a program.* In fact, it is in derogation of it. It is difficult to perceive that Congress intended such a result.

(Emphasis added.) 478 F.2d at 1114. See also *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689 (E.D. Va. 1973); *Local 2677, American Federation of Government Employees v. Phillips*, 358 F. Supp. 60 (D.D.C., 1973).

The rationale of *Volpe, supra*, bears forceful application to the present case. The Congressional intent as manifested in the Act here absolutely requires the Administrator to pro-

vide federal financial assistance for construction of publicly owned sewage treatment works. The Administrator was given discretion only to insure that the facilities are well designed and constructed for efficient operation and are capable of meeting the needs of the people in the areas to be served at the lowest possible cost. The Administrator's unlawful action here has the effect of disapproving numerous projects without proper review under the limitations and conditions of Section 204, thereby subverting the legislative objective.

Judge Miles Lord, in considering *State of Minnesota v. Fri, supra*, followed the rationale of *Volpe, supra*. He correctly noted:

> Nothing in the Act gives the Administrator the authority to consider matters outside the corners of the Act itself. In failing to allot all of the money authorized in this matter, the Administrator is acting in express violation of the Act itself as well as in violation of the purposes of the Act as set forth by Congress. Furthermore, to the extent the Administrator has some discretion in this matter, the refusal to allot nearly half of the funds authorized *for reasons not related to the Act and its stated purposes* marks a clear abuse of such discretion.

(Emphasis added.) Slip Op. at 14.

The Administrator cannot be allowed to exercise discretion as though the Act did not exist. The Act alone must be the basis for any exercise of discretion by the Administrator.

2. The refusal to allot 55% of the funds authorized is a flagrant abuse of discretion because it effectively frustrates the intent of Congress as embodied in the Act.

The action of the Administrator drastically reduced the States capacity to carry out the purposes of the Act to fund the construction of sewage treatment facilities for the abatement of pollution of the waters of the State. The present Minnesota allotment is $121 million short of full allotment for the two fiscal years in question.[14] The Minnesota Pollution Control Agency, the agency administering the federal grant program, had pending 140 grant applications to upgrade or construct publicly owned treatment works for fiscal year 1973. These applications represented an estimated total construction cost of $212 million. If 75 percent federal funding were available, this would amount to $160 million. Consequently, the needs of Minnesota outstripped the Administrator's allotted amount for fiscal 1973 alone by a minimum of $119 million. Under the Administrator's allotment only 13 of the 140 applicants of the MPCA would be fully funded and one or two others stood to be partially funded. The total number of grant applicants for fiscal 1974 is approximately 200. This figure includes a carry-over of those projects from fiscal 1973 which were not funded. The Administrator's allotment allows funding of only five additional projects in fiscal 1974.[15]

Minnesota's case is not an isolated example. Its experience is duplicated in many, if not all States, with the result that thousands of plant construction projects have gone unfunded. Many more will go unfunded in the upcoming fiscal

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[14] Allotment Regulation, 37 Fed. Reg. 26282 (1972).

[15] These facts were presented by affidavits in *State of Minnesota v. Fri, supra*, and were not disputed by the Administrator.

years as the needs of the States go unmet. These monies will not be forthcoming unless allotted as required by law. The program initiated by the Act has effectively ground to a halt, frustrating the express intentions of the Congress.[16]

Furthermore, the intricate statutory scheme is so interrelated that the action of the Administrator has set off a domino-like chain reaction. Not only are projects halted now but municipalities are discouraged from proceeding with construction plans on their own. EPA regulations prohibit the awarding of any grant if initiation of the project construction has occurred, 38 Fed. Reg. 5330, §35.903(d) (1973). The inevitable result is that no eligible applicant or grantee will proceed with construction until the Administrator approves its project and thereby legally guarantees 75 percent federal funding. The Act holds out a generous "carrot" which no potential recipient can, as a practical matter, refuse. Consequently, no construction or upgrading of publicly owned treatment works in Minnesota and other States will be initiated until federal grants are made available for obligation by the Administrator.

The resulting total paralysis of the program is an intolerable situation for potential grantees. They are faced with statutory deadlines to meet specific effluent limitations. All publicly owned treatment works in existence on July 1, 1977, are required to have effluent limitations based on a minimum of secondary treatment. More stringent standards may be applicable to public treatment works by July 1, 1977, if necessary to meet water quality standards established pursuant to

[16] This Court should not be misled by Table I, Petitioner's Brief, p. 49, showing that many States have not fully obligated the reduced allotments. Minnesota has numerous project applications pending approval by the Administrator. Indeed Table I more correctly indicates the grant program is floundering because of the Administrator's failure to make a full commitment of the funds.

State law or regulation. Section 301(b)(1)(B) and (C). This means that all publicly owned treatment works presently have less than three years to be in compliance with Federal and State laws and regulations. Construction of major projects can easily take three or four years. Those treatment works that fail to meet the effluent standards face a civil penalty of up to $10,000 per day of violation. Section 309(d). Any citizen adversely affected by a violation of an effluent standard may initiate legal action. The remedies available by a citizen suit could include appropriate civil penalties under Section 309(d) of the Act. Section 505(a)(1) and (2). As a result, without the allotment of the impounded funds, many communities, particularly smaller ones, will simply be unable to comply with the effluent standards and will thereby be subject to enormous penalties.

Congress could not have intended for its purposes to be so effectively emasculated by the action of one official at one stage of the statutory scheme. The Administrator suggests that he has the authority and will eventually allot the full amount of the authorized funds, and thus there is no adverse effect on the States. This assumes that there is legal merit to the Administrator's interpretation of Sections 205 and 207, an interpretation which must be rejected as a spurious afterthought.

When Sections 205 and 207 are analyzed in the context of the whole Act and its legislative history, the inevitable conclusion is that the Administrator must allot the full sums authorized by Congress. It is inconceivable that Congress intended to grant the Administrator unfettered discretion at the allotment stage and thereby make the Act a series of empty promises.

Failure to allot over half of the sums authorized for fiscal year 1973 and 1974 was a clear abuse of discretion.

3. The President and the Administrator cannot do indirectly what the President was forbidden by Congress to do by veto.

When the Act was first passed by Congress the President exercised his veto power over it. At that time he understood that Congress intended the full allotment of funds. In his veto message he stated:

> Certain provisions of . . . [the] bill confer a measure of *spending discretion and flexibility* upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.
>
> But the law would still exact an unfair and unnecessary price from the public. For I am convinced . . . that the pressure for full funding under this bill would be so intense that funds approaching the *maximum authorized* amount could ultimately be claimed and paid out, no matter what technical controls the bill appears to grant the Executive.

(Emphasis added.) 118 Cong. Rec. H. 10266 (Daily ed. October 18, 1972).

The President recognized that the Act *required* the use of the funds for the purposes appropriated and vetoed it for that reason. Congress overrode this veto, reaffirming its strong commitment to the program.

It is significant that the President, in *vetoing* the bill, actually assumed an interpretation of the Act contrary to that subsequently taken in impounding the funds. The President initially assumed the existence of discretion only at the *spending* level. However, after the veto was overridden the President assumed the right to impound at the earlier stage of *allotment*. The fact that the President originally interpreted the Act in the same manner as that contended by the Respondents constitutes a compelling argument against the subsequent contrary interpretation taken by the President through the Administrator. Presumably, the President concluded that he would be under pressure to spend more than he desired unless he impounded at the allotment stage. The President and the Administrator cannot do indirectly what the President originally recognized he could not do directly.

Where the Executive Branch is mandated by Congress to expend funds for a well-defined program containing specific time tables set up to reach the desired goal, it is the *duty* of the Executive to execute that law. The Executive may not decline to execute it.

The position of the State of Minnesota is further supported with compelling effect by a memorandum authored by Justice William Rehnquist when he was serving as an Assistant Attorney General in the Office of Legal Counsel of the Department of Justice. The memorandum was addressed to the Deputy Counsel to the President and concerned the President's authority to impound funds appropriated for aid to federally impacted schools. It reads in part as follows:

> With respect to the suggestion that the President has a *constitutional power to decline to spend* appropriated funds, *we must conclude that existence of such a broad power is supported by neither reason nor precedent.* There is, of course, no question that an appropriation act permits but does not require the executive branch to spend funds. See 42 Ops. A.G. No. 32, p. 4 (1967). *But this is basically a rule of construction,* and does not meet the question whether the President *has authority to refuse to spend where*

> the appropriation act or *the substantive legislation, fairly construed, require such action.*
>
> . . . .
>
> It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and *it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them.*

(Emphasis added.) The Rehnquist memorandum is reprinted at 119 Cong. Rec. S. 3808 (Daily ed. March 1, 1973).

The principle that an administrative official may be compelled to expend money mandated to be spent was established long ago in *Kendall v. United States*, 12 Pet. 524 (1838), where it was held that mandamus law to compel the Postmaster General to pay to a contractor an award which had been arrived at in accordance with a procedure directed by Congress for settling the case. Here the Executive Branch should thus be compelled to act within the bounds defined by the law by allotting the monies needed to implement the comprehensive program to attain clean water.

III. THE ACTION OF THE ADMINISTRATOR IS NOT SO "COMMITTED TO AGENCY DISCRETION" AS TO BE NONREVIEWABLE.

The Administrator contends that his refusal to allot 55% is nonreviewable because it comes within the admittedly "very narrow" exception of the Administrative Procedure Act, 5 U.S.C. §701 (Supp. V) making actions "committed to agency discretion by law" not subject to review. This contention has no merit, for the exception is limited to cases where the statute is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). In this case there is abundant statutory language governing the bounds of the Administrator's actions. Once these limits are exceeded the action is reviewable. It is clearly the business of the judicial branch to determine the limits of statutory grants of authority. Justice Reed in *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944), placed the issue in proper perspective.

> When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justifiable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. *Cf. United States v. Morgan*, 307 U.S. 183, 190-91.

> This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by exertion of unauthorized administrative power.

In determining whether the Administrator's action is inconsistent with the Act, this Court should follow the basic canon of construction observed in *Richards v. United States:*

> We believe it fundamental that a section of statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpretating legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy."

369 U.S. 1, 11-12 (1962).

The provisions of the Act provide the appropriate standards. A court by analysis of the Act can easily determine that the latitude of the questioned discretion is not as broad as the Administrator mistakenly asserts. The standards for review are found in the purposes and policies of the Act, its objectives and goals, its project review provisions, its time limits and its effluent limitations. As Judge Russel stated in *Campaign Clean Water v. Train,* 489 F.2d 492, 498 (1973).

> [T]he executive . . . has the constitutional duty to execute the law in accordance with the legislative purpose so expressed. When the executive exercises its responsibility under appropriate legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review.

The Act does not confer upon the Administrator or his agency the discretion to deny allotment of funds using any other standards but those provided in the Act. The Administrator is asking the Court to recognize discretion that totally disregards the Act and thereby negates the existence of *any* law applicable to him. The Administrator's contention is untenable.

CONCLUSION

The State of Minnesota respectfully requests that the Court hold that the Administrator is mandated by the Act to allot to the States the full amount of sums authorized by Congress for the construction of publicly owned sewage treatment facilities. In the alternative, the Court should hold that the action of the Administrator constituted an abuse of discretion.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
BYRON E. STARNS
Deputy Attorney General
PETER W. SIPKINS
Solicitor General
ELDON G. KAUL
Special Assistant
Attorney General
1935 W. County Road B2
Roseville, Minnesota 55113
Attorneys for the Amicus
State of Minnesota

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